

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLES ALBERT CONLEY,

Defendant-Appellee.

UNPUBLISHED

June 13, 2000

No. 219741

Recorder's Court

LC Nos. 96-001619

96-001747

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of carjacking, MCL 750.529a; MSA 28.797a, arising from two separate incidents.¹ He was sentenced to juvenile probation and committed to the Family Independence Agency (FIA) until age twenty-one. This case comes to this Court on remand from the Michigan Supreme Court for consideration of the prosecution's appeal as on leave granted.² We reverse and remand.

Defendant was sixteen years old when he was involved in two carjacking incidents. The first occurred in the parking lot of a party store and resulted in the death of Edward Ellis. Defendant and Dale Byrd discussed taking Ellis' minivan before approaching him. Byrd used a gun to take Ellis' keys, and then shot him execution style. Byrd and defendant drove away in the van. Three days later,

¹ Defendant was originally charged with carjacking, MCL 750.529a; MSA 28.797a, armed robbery, MCL 750.529; MSA 28.797, and first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), in connection with the first incident and carjacking, MCL 750.529a; MSA 28.797a, armed robbery, MCL 750.529; MSA 28.797, unlawfully taking possession and driving away a motor vehicle, MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), in connection with the second incident. The additional charges were dismissed after defendant pleaded guilty to both counts of carjacking in connection with a plea agreement.

² 459 Mich 990 (1999).

defendant, acting alone, approached Hanna Czech at a gas station. He ordered Czech out of her car at gun point. Czech complied and was unharmed. Defendant drove away in the car.

Following acceptance of defendant's guilty pleas, the trial court held a sentencing dispositional hearing to determine whether defendant should be sentenced as a juvenile or as an adult. The prosecution presented three experts, who claimed that defendant's lack of remorse for the offenses, failure to obey authority figures and inability to interact with peers on equal footing made him a poor candidate for a juvenile treatment program. Those witnesses believed there was insufficient time for rehabilitation in the juvenile system before defendant's twenty-first birthday and recommended that defendant be sentenced as an adult. The director of the youth home where defendant had been residing prior to the hearing testified that defendant had made progress at the home and that he had a better chance of rehabilitation in juvenile detention. He opined that defendant would not present a danger to the public if released at age twenty-one and recommended a juvenile sentence. The trial court sentenced defendant to juvenile probation and committed him to the FIA until age twenty-one. On appeal, the prosecution argues that the trial court abused its discretion in deciding to sentence defendant as a juvenile. We agree.

This Court employs a bifurcated procedure in reviewing a trial court's decision to sentence a minor as a juvenile or as an adult. A trial court's findings of fact are reviewed for clear error. *People v Thenghkam*, __ Mich App __; __ NW2d __ (Docket No. 207303, issued 2/29/00), slip op p 6; *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 56 (1997). Factual findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm conviction that a mistake was made. *Thenghkam, supra*; *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994). The ultimate decision whether to sentence a minor as a juvenile or as an adult is reviewed for an abuse of discretion. *Thenghkam, supra* at slip op p 5; *Dilling, supra* at 52. At the time the trial court sentenced defendant, it was required to consider the following criteria in deciding whether to sentence him as a juvenile or as an adult:

- (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.
- (b) The seriousness and the circumstances of the offense.
- (c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:
 - (i) The juvenile is not amenable to treatment.
 - (ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security. [MCL 769.1(3); MSA 28.1072(3);³ see MCR 6.931(E)(3) (requiring consideration of substantially similar factors).]

A trial court abuses its discretion when it fails to weigh that criteria in a meaningful way. *Thenghkam, supra* at slip op p 7; *People v Perry*, 218 Mich App 520, 542; 554 NW2d 362 (1996). The trial court must give each criterion “weight as appropriate to the circumstances.” MCL 769.1(3); MSA 28.1072(3); MCR 6.931(E)(3). Further, the trial court must consider and balance all the factors listed in the statute. *People v Cheeks*, 216 Mich App 470, 478-479; 549 NW2d 584 (1996); see *Thenghkam, supra* at slip op p 7. The prosecution has the burden of showing by a preponderance of the evidence that the best interests of the defendant and the public would be served by sentencing the defendant as an adult, rather than as a juvenile. MCR 6.931(E)(2); *Brown, supra* at 505-506.

Here, the prosecution argues that the trial court abused its discretion in sentencing defendant as a juvenile after failing to make all statutorily required findings. The prosecution asserts that, had all necessary findings been made, the circumstances would have weighed in favor of sentencing defendant as an adult.

After the conclusion of the dispositional hearing, the trial court stated as follows:

All right. The Court is to determine today whether Mr. Conley should be treated as an adult and sentenced to the adult system, or as a juvenile and effectively placed on probation in the care, custody and control of the independence agency, as pointed out by both sides. The parties to whom the statute requires referring for reporting to the court and making recommendations as to disposition, they being the Family Independence Agency, a probation department, and the court on its own motion referred the matter to the then Recorder's Court clinic, psychiatric clinic. The examiners and scriveners of the reports were unanimous in their recommendation that Mr. Conley be treated as an adult for reasons they set forth.

Mr. Conley was initially charged with first degree felony murder, armed robbery, and carjacking, and he plead guilty to the offense of carjacking. There were two persons charged in the events that resulted in the killing of Edward Ellis and taking his motor vehicle. The killer, [Dale Byrd] . . . [t]hrough feigning illness delayed this

³ Before amendment by 1998 PA 520.

matter's disposition substantially by constant necessary referrals for his examination by the psychiatric clinic on the question of his competency to stand trial. After that matter was resolved, and he was faced with trial, he plead guilty, I believe to murder in the second degree. He was the killer, the executioner of Mr. Edward Ellis.

Mr. Conley's circumstances are that he was with Mr. Byrd. He was aware of the intent to take by force or threat of force Mr. Byrd's vehicle, and did willingly join in doing that, and kept it from its rightful owner for a period of time, until he was arrested.

From what I know of the case, it is doubtful on a factual as well as legal basis that Mr. Conley could have been convicted of the murder of Mr. Ellis. It is further doubtful that were he adjudicated guilty of armed robbery and carjacking that the two convictions could stand as a matter of law. So, the resolution of the case, legally speaking, that being his adjudication of guilt, either by plea or trial, of carjacking is what he did. He did not kill anyone. I don't think there is any evidence warranting a finding that he knew that the killer was going to kill. He knew that a person had been shot, probably knew that the person might well die as a result of being shot. Common sense would tell a person that.

So what we're addressing here with regard to Mr. Conley is what Mr. Conley did. That's what the court is addressing, in any event.

That Mr. Conley is now 18 and committed this act when he was 16 is attributable to nothing that he has done or his Counsel in delaying the disposition of this matter. Those delays were and are attributable to his codefendant, Mr. Byrd.

Prosecution is correct in its recitation of the history of Mr. Conley and its pejorative remarks on that history. He does have a history of violence, even amongst his siblings. He does have a history of disregarding authority, aunt, older sister, mother, other persons.

A court would be perfectly justified in retribution in sentencing Mr. Conley to the adult system. What we have, having done that in Mr. Conley's eventual release, what would we, this society, have when he is released? Because nothing this Court can do would preclude his eventual release. We would have a person who has been antisocial, not heedful of authority, not respectful of authority, not heedful or respectful of the concerns and cares of his fellow human beings, and likely to have that circumstance exacerbated by hardened criminals in the adult system.

Again, Mr. Conley killed no one. I am aware of no evidence warranting a finding that he knew the killer would kill, and did, in fact, kill, until after it had been done.

For the Court to go against the recommendation, uniform recommendation of the psychiatric clinic, the Family Independence Agency, and the Probation Department is something that should not be lightly done. But the Court would not lose control over Mr. Conley if it were to sentence him in the juvenile system. It would lose control over Mr. Conley if it sentenced him to the adult system. If Mr. Conley had not learned to respect the rights and concerns of his fellow human beings, the Court can place him with people who think and feel that same way for a substantial period of time.

Frankly, I'd much rather do that than to cast him to the wolves where he can acquire more sophisticated antisocial behavior patterns and behaviors. It is for that reason and only for that reason that the Court can maintain some control, with a sledge hammer at its side to encourage Mr. Conley to conform his behavior to that which is acceptable to his neighbors and his fellow human beings.

Further, I know that he's capable of doing it, so his failure or refusal to do it would only be viewed as willful and intentional by this Court, warranting this Court in doing whatever the law allows, which in this case would be sentence him to life in prison or any term of years.

It is the sentence of this Court that you be committed to the custody of the Michigan Family Independence Agency until you attain age 21 or until further order of this Court.

Mr. Conley, you are effectively on probation. Any violation of the law you might be tempted to commit and are found to have committed will result in you going to prison for a long, long time.

As evident from the above cited portion of the hearing, the trial court did not make specific, detailed findings with respect to each of the factors enumerated in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3). *People v Hazzard*, 206 Mich App 658, 660; 522 NW2d 910 (1994).⁴ Moreover, the

⁴ We recognize that *Hazzard* held that a trial court abuses its discretion with respect to its decision to sentence a defendant as a juvenile or as an adult when it "[does] not make complete, detailed findings with respect to each of the requisite factors" *Id.* at 660; see *Perry, supra* at 542; *People v Valentin*, 220 Mich App 401, 408; 559 NW2d 396 (1997), *aff'd* and remanded 457 Mich 1; 577 NW2d 73 (1998). Under that standard, the trial court's decision to sentence defendant as a juvenile in the present case was certainly an abuse of discretion. Nowhere in the lower court record did the trial court make complete, detailed findings regarding each of the factors enumerated in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3). Instead, it made findings with respect to only some of the factors.

trial court failed to establish that it considered all of the factors enumerated in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3). The trial court merely discussed its findings and conclusions with respect to some of the factors. We hold that the trial court erred in failing to consider all the factors listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), and in failing to weigh and balance those factors when it decided to sentence defendant as a juvenile. See *Thenghkam, supra* at slip op p 7; *Cheeks, supra* at 478-479.

There was testimony at the dispositional hearing that defendant had dropped out of school and was physically and mentally mature. However, the trial court did not indicate whether those circumstances were considered or weighed in its decision to sentence defendant as a juvenile. Moreover, although the trial court noted that defendant had a history of violence amongst his siblings and a history of disregarding authoritative family members, there is no indication that history was meaningfully weighed against the other factors. The trial court only briefly discussed the circumstances surrounding the offenses so as to mitigate defendant's involvement. It is clear that the trial court placed considerable emphasis on the theory that imprisonment in the adult system would result in defendant acquiring additional criminal skills and antisocial tendencies. The trial court also emphasized that sentencing defendant as a juvenile would allow the court to change defendant's sentence should he

We, however, question the rationale of *Hazzard*. A trial court is statutorily required to make findings of fact regarding the basis for its decision to sentence a defendant as a juvenile or as an adult. MCL 769.1(6); MSA 28.1072(6); MCR 6.931(E)(4). However, neither statute nor court rule requires a trial court to make detailed findings on the record regarding each enumerated factor. The text of the statute and court rule require a trial court to "consider" the factors, giving each its appropriate weight under the circumstances, MCL 769.1(3); MSA 28.1072(3); MCR 6.931(E)(3), and to state on the record its findings of fact and conclusions of law regarding its decision. MCL 769.1(6); MSA 28.1072(6); MCR 6.931(E)(4).

When interpreting a statute, this Court should ascertain and give effect to the intent of the Legislature. *People v Humphreys*, 221 Mich App 443, 451; 561 NW2d 868 (1997). We must do so by first turning to the language contained within the statute. *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). The Legislature is presumed to have intended the meaning it plainly expressed. *People v Roseburgh*, 215 Mich App 237, 239; 545 NW2d 14 (1996). If the language is clear and unambiguous, statutory construction by this Court is precluded. *People v Armstrong*, 212 Mich App 121, 123; 536 NW2d 789 (1995). Adhering to these principles, we question whether *Hazzard* imposes a duty on trial courts beyond that which is mandated by the plain language of MCL 769.1; MSA 28.1072 and MCR 6.931(E). However, we need not determine whether *Hazzard* was wrongly decided since the trial court in this case failed to make a record to demonstrate whether it satisfied the requirement of the statute and court rule to "consider" each factor. In the absence of a determination from the Supreme Court or this Court by an opinion issued pursuant to MCR 7.215(H)(6), *Hazzard* remains binding on the trial court. Thus, notwithstanding our criticism of *Hazzard*, on remand the trial court should comply with *Hazzard's* requirement of making complete, detailed findings regarding each statutory factor.

violate his probation. See MCL 769.1(10); MSA 28.1072(10).⁵ With those considerations in mind, the trial court found that defendant could be better rehabilitated in the juvenile system prior to turning twenty-one. See MCL 769.1(3)(d) and (e); MSA 28.1072(3)(d) and (e); MCR 6.931(E)(3)(d) and (e).

In focusing narrowly on the issue of rehabilitation, the trial court failed to meaningfully balance and weigh all necessary factors. A trial court may not give the findings on any one of the statutory factors “preeminence over the others.” *Thenghkam, supra* at slip op p 7, quoting *Perry, supra* at 542. Defendant’s potential for rehabilitation should have been weighed against the particularly serious nature of these offenses, defendant’s physical and mental maturity, defendant’s pattern of living, whether the offenses constituted a pattern that would indicate defendant is not amenable to juvenile treatment or would likely disrupt the rehabilitation of other juveniles in the treatment programs, and the best interests of the public welfare. MCL 769.1(3)(a), (b), (c) and (f); MSA 28.1072(3)(a), (b), (c) and (f); MCR 6.931(E)(3)(a), (b), (c) and (f). Accordingly, we conclude that the trial court abused its discretion in sentencing defendant as a juvenile. *Thenghkam, supra* at slip op pp 7, 17-18.⁶

Reversed and remanded to the trial court to balance and weigh the factors enumerated in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), to render factual findings consistent with this opinion and, thereby, determine whether defendant should be sentenced as a juvenile or as an adult. If the court determines that defendant should be sentenced as a juvenile, it shall dismiss the case because defendant is no longer a juvenile. *Thenghkam, supra* at slip op p 21. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

⁵ Before amendment by 1998 PA 520.

⁶ Because our review of the present case is limited to whether the trial court’s findings with respect to the statutory factors were clearly erroneous and whether the trial court abused its discretion in weighing and balancing its findings with respect to those factors, we do not specifically consider whether the prosecution met its burden of proving beyond a preponderance of the evidence that the best interests of defendant and the public would be served by sentencing defendant as an adult, rather than as a juvenile. MCR 6.931(E)(2); *Brown, supra* at 505-506; see also *Thenghkam, supra* at slip op p 5 (recognizing that the bifurcated procedure for reviewing a trial court’s decision to sentence a defendant as a juvenile or as an adult requires a reviewing court to exercise great discipline in resisting the temptation to substitute its own view of the underlying evidence for the trial court’s assessment).